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IN THE

Supreme Court of the United States

ROBERT THOMAS GARNER, III,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are disability benefits payable to a disabled Federal employee under the Federal Employees' Compensation Act ("FECA") totally noncontractual and discretionary or are such benefits contractual so as to form an appropriate basis for a Constitutional claim?

Does a retroactive application of 5 U.S.C. § 8148, which operates to subject a disabled federal employee to a lifetime forfeiture of disability benefits, violate the *ex post facto* clause, if such lifetime forfeiture is based upon criminal acts which occurred almost a year before the lifetime forfeiture statute was enacted?

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit opinion is unreported and appears as Appendix A at page 1a herein. The District Court opinion is unreported and appears as Appendix B at page 12a herein.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on August 22, 2000 and revised August 24, 2000. A Petition for Panel Rehearing was timely filed on August 30, 2000. The Court of Appeals entered an order denying the petition for rehearing on October 24, 2000 (attached as Appendix C at page 26a herein). This Petition for Writ of Certiorari was filed within 90 days of the denial of the Petition for Panel Rehearing.

The United States Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Article I, Section 9, subsection 3 to the United States Constitution.

Section 9. Powers Prohibited to the United States at subsection 3 provides:

> No Bill of Attainder or *ex post facto* Law shall be passed.

STATEMENT OF THE CASE

A. The Undisputed Facts.

There is virtually no dispute as to any significant facts in this case. On November 20, 1997, Robert Garner, Petitioner herein, pled guilty to one misdemeanor violation of 18 U.S.C. § 1920 for failing to report $854.52 on a form required by FECA. The Memorandum of Understanding as well as the Judgment in a Criminal Case specifically indicated such offense was a misdemeanor which concluded on November 11, 1993.

On February 13, 1998, Garner received a letter from the Department of Labor indicating Garner was "not entitled to receive further benefits under FECA." On February 26, 1998, Garner filed a Notice of Request for Reconsideration wherein Garner asserted:

> On November 11, 1993, § 8148 did not include forfeiture of entitlement to all benefits. The Amendment to such statute making such forfeiture applicable was not enacted *until September 20, 1994*. (Emphasis found in Notice).

Essentially, an *ex post facto* violation was asserted then as it is now.

On March 31, 1998, the Department of Labor (Office of Workers' Compensation Programs) in its Notice of Decision essentially acknowledged an *ex post facto* violation but insisted a lifetime forfeiture was statutorily required:

> By way of background information, Public Law 103-333 went into effect on 9/30/94 and amended

> Section 8148 of the Act by adding a provision for the termination of benefits payable to individuals who have been convicted of defrauding FECA programs. Therefore, since the date of the conviction is the determining factor rather than the date of when the misdemeanor occurred, Section 8148 applies to your situation.

(Appendix D beginning at page 27a with quoted material found at page 29a, para. 2, lines 4-12, herein).

Noteworthy at this point is the fact that Petitioner Garner has always agreed he "forfeits his right to compensation with respect to any period for which the affidavit or report was required" (fifteen months) as was provided by 5 U.S.C. § 8106(b)(2) as was the law on November 11, 1993, the time of the occurrence of facts supporting his misdemeanor offense. Under this pre-amendment statute, three critical factors or considerations existed: (1) the statute is clearly one of forfeiture as indicated by use of the verb "forfeits;" (2) Garner has a specific "right to compensation" which essentially is a contractual right; and (3) a specific limited term of forfeiture (fifteen months) is statutorily provided.

On the contrary, Petitioner Garner has continually objected to the Department of Labor's reliance on 5 U.S.C. § 8148, as amended September 30, 1994, almost a year *after* his crime was committed. Under this amended statute, Garner's "right to compensation" as referred to in 5 U.S.C. § 8106(b)(2) was retroactively reduced to an "entitlement" under 5 U.S.C. § 8148(a) and the period of forfeiture was retroactively increased from fifteen months to a lifetime. In essence, under the amended statute, critical factors or considerations that Garner had under the pre-amendment statute were lost or seriously modified to Garner's detriment.

On April 3, 1998, Garner appealed to the Employees Compensation Appeals Board (hereinafter "ECAB").

Hearing nothing, Garner on May 5, 1998, requested ECAB process his claim "as expeditiously as possible." On May 11, 1998, the ECAB informed Garner it was taking "20 to 24 months, from the time an appeal is filed, for a decision to be issued."

B. Court Proceedings Below.

On May 19, 1998, Petitioner Robert Garner filed suit in the U.S. District Court for the Southern District of Mississippi, Western Division.

Essentially, the Complaint alleged the 20 to 24 month period was not an appropriate administrative remedy and exhaustion of such should not be required. The Complaint also adopted the *ex post facto* claims as found in the original Request for Reconsideration as filed February 1998. In fact, all relevant documents attached to the Complaint were documents utilized in such administrative "hearings" and appeals. The Complaint asked for Relief of Mandamus, damages and that the *retroactive* application of 5 U.S.C. § 8148(a) be declared unconstitutional.

On July 20, 1998, the U.S. Department of Labor filed a Motion to Dismiss and an accompanying Memorandum Brief was provided to the Court. On July 27, 1998, Garner filed his Answer to Motion to Dismiss, and Garner provided an accompanying Memorandum Brief in Opposition to Defendant's Motion to Dismiss.

On March 29, 1999, the District Court Judge agreed exhaustion of administrative remedies was not required; however, the District Court Judge issued and entered his Memorandum Opinion and Order and Judgment dismissing the cause. (Appendix B at page 12a herein). Essentially, the District Court ruled that Garner had not overcome the "door closing provision" as discussed in *Woodruff v. U.S. Department of Labor*, 954 F.2d 634 (11th Cir. 1992), and there were no hearings, and the record consisted entirely of the written documents concerning the Administrative appeals.

On April 20, 1999, Robert Garner appealed the decision of the District Court to the Fifth Circuit Court of Appeals. After filing of all briefs, oral arguments were heard on May 4, 2000. On August 22, 2000, the Fifth Circuit, by written decision, affirmed the decision of the lower Court. (Appendix A). On August 30, 2000, Robert Garner filed a Petition for Panel Rehearing alleging: (1) the Fifth Circuit erred by failing to limit its inquiry to the specific relief requested, to-wit: a partial constitutional invalidation; and (2) the Fifth Circuit Court erroneously concluded Garner's right to disability was a "non-contractual government benefit."

On October 24, 2000, the Fifth Circuit denied such Petition for Rehearing with no written opinion addressing either of the two issues cited in the Petition for Rehearing as aforesaid. (Such denial is found in Appendix C at page 26a herein).

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit Court of Appeals squarely presents to this Court previously unaddressed issues of monumental importance concerning whether FECA benefits are contractual or discretionary, and the appropriate method of appellate review regarding the issue of unconstitutionality.

The Fifth Circuit erred on two major grounds:

First, a critical issue in this case is whether Petitioner Garner had a right to disability benefits or whether or not such benefits are "non-contractual" and subject to the "discretion of the Department of Labor." The Fifth Circuit held such to be only discretionary, non-contractual benefits and not sufficient to involve a Constitutional claim. Essentially, such ruling erroneously allows the Department of Labor to operate outside any restraints imposed by the United States Constitution.

Secondly, Petitioner Garner asserted that only that part of 5 U.S.C. § 8148 which allowed a retroactive application was unconstitutional and could easily be severed from the statute. The Fifth Circuit in essence reviewed the statute "taken as a whole" and failed to recognize that if an obvious *ex post facto* part of a statute can be severed without serious harm to the statute taken as a whole, then a partial invalidation of the statute is both warranted and required.

I.

FECA BENEFITS: CONTRACTUAL OR DISCRETIONARY?

The Fifth Circuit specifically ruled that FECA disability benefits are "noncontractual" and "discretionary":

> As the Supreme Court has made abundantly clear, the denial of a noncontractual government benefit does not fall within the historical meaning of legislative punishment. In the case at bar, Garner is disqualified from receiving benefits which the government in its discretion, provided.

(Appendix A with quoted material at page 8a, para. 2, herein).

Argument:

Garner was entitled to receive and had the right to receive both disability and medical benefits under 5 U.S.C. § 8102(a): "The United States *shall* pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury while in the performance of his duty. . . ." Similarly, under 5 U.S.C. § 8103(a): "The United States shall furnish to an employee who is injured in the performance of duty . . ." Even under 5 U.S.C. § 8106(b)(2) (the pre-amendment forfeiture statute), the law refers to "his *right* to compensation." In short, when Garner became a federal employee and was injured, he became far more than just a member of the general public entitled to public welfare benefits or participation in Medicare programs. He became a disabled Federal worker specifically entitled to benefits under 5 U.S.C. § 8101 to § 8193. As stated in *Busey v. Washington, D.C.*, 225 F. Supp. 416 (1964), "Purpose of this subchapter *is not only to provide employees remedy* which is both expeditious and independent of proof of fault, but also for the *United States' liability which is limited and determinate.*"

As a worker injured on the job, Garner was at least entitled to be punished by the forfeiture provision in effect at the time of his crime and not a retroactive application of a law written *after* his crime.

Further, in *Locke v. City of New Orleans*, 4 Wall 172 (1867), the Court specifically held the *ex post facto* clause applies to "forfeitures" and noted, "It was the sense in which it was understood at the time the Constitution was adopted, both in this country and in England." There can be no question the case at bar involves a forfeiture as pre-amendment statute 5 U.S.C. § 8106 utilizes the verb "forfeits" and even the amended statute also utilizes the verb "shall forfeit."

In *Flemming v. Nestor*, 363 U.S. 603 at 616; 4 L. Ed. 2d 1435 at 1447; 80 S. Ct. 1367 (1960), hereinafter "*Flemming*," the Supreme Court noted, "Although the governing criterion may be readily stated, each case turned on its highly particularized context."

In *Flemming*, the five member majority Court held ". . . the *non-contractual* interest of an employee covered by the Act (Social Security) cannot be analogized to that of the holder of an annuity, whose right to benefits is bottomed on his *contractual* premium payments." Emphasis added. However, the Court in *Flemming* further noted with approval that in *United States v. Lovett*, 328 U.S. 303, 90 L. Ed. 1252, 66 S. Ct. 1073, the Court "invalidated, as a bill of attainder, statute forbidding . . . the further payment of salaries of three named government employees." Such ruling was based on the Court's conclusion a "punishment" had been imposed.

Also in *Flemming*, Justice Black, in one of three vigorous dissenting opinions, noted that:

> In *Lynch v. U.S.*, 292 U.S. 571, 78 L. Ed. 1434, 54 S.Ct. 850, this Court unanimously held Congress was without power to repudiate and abrogate in whole or in part its promise to pay amounts claimed by soldiers under the War Risk Insurance Act of 1917.

Since *Flemming*, the United States Supreme Court has never extended or allowed an *ex post facto* law to defeat a *contractual* right. Further, in *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), the Court concluded "fair warning" was the pivotal issue. Obviously, no such "fair warning" was given to Garner.

Garner submits the Fifth Circuit has misapprehended *Flemming*, and erred in concluding Garner's entitlement to benefits was "non-contractual" and "discretionary." Garner's entitlement was on the contrary based upon judicial precedents and specific defined statutes, which specifically afforded Garner a contractual "right to compensation."

II.

THE APPROPRIATE METHOD OF REVIEW.

Petitioner Garner never questioned the constitutionality of the *prospective* application of the lifetime forfeiture. Garner asserted that only that part of 5 U.S.C. § 8148 which allowed a *retroactive* application was unconstitutional and could easily be severed from the statute by a "partial invalidation" under *Carter v. Carter Coal Co.*, 298 U.S. 238, 80 L. Ed. 1160 (1936), hereinafter "*Carter*".

Argument:

In *Carter*, the Court held that the determination of severability or inseparability is "reached by applying the same test — namely, what was the intent of the lawmakers?" In the case *sub judice*, it is obvious that Congress did not consider a primary concern of the amended statute was to make sure disabled employees such as Garner would incur a lifetime forfeiture for crimes committed prior to enactment of the amendment which authorized such increase in penalty. The focus of the amended statute was the *prospective* application and the deterrent effect such prospective application would have on future conduct, *not conduct which had already occurred*. Garner can find no record that Congress even considered this retroactive application or the

ex post facto considerations, nor has the Department of Labor produced any record of such. Garner opines that the retroactive application was certainly not a primary concern of Congress and probably was not even considered; hence, such retroactive part of the statute is easily severable. Garner further opines that the appropriate method of review is to focus only on the retroactive portion of the statute, as opposed to the entire statute, and if no reasonable legislative purpose can be deduced for such retroactive application, then such *retroactive* application is unconstitutional as a violation of the *ex post facto* clause.

Both the District Court and the Fifth Circuit applied a balancing test essentially concluding that if the primary purpose of the statute "taken as a whole" was remedial rather than punitive, then the statute would be constitutional notwithstanding a retroactive application. There are two reasons why such application is error.

First, no court has ever allowed or authorized the use of the primary purpose test in a case in which a contractual right is at issue. The only exception to such is arguably *Slugochi v. United States*, 988 F. Supp. 1443 (S.D. Fla. 1997).

Secondly, utilization of the primary purpose test allows a constitutionally repugnant single element of a multi-faceted statute to be saved by reference to other aspects of the same statute. As in the case at bar, no person, administrative agency, or court has ever even addressed the issue of what rational legislative purpose is served by stripping Garner of a lifetime of disability benefits based upon a statute which was not in existence at the time of his criminal acts. Instead, the Department of Labor and the lower courts have all focused on the remedial nature of the statute "taken as a

whole." This remedial nature involves only the *prospective* application of § 8140, to-wit: deterrence of similar crimes. This remedial nature has absolutely nothing to do with Garner as his crime concluded before the amending statute was even enacted. Garner has never insisted or even asked that the statute be "taken as a whole." Garner only insists the retroactive application is unconstitutional and should be severed.

In summary, that portion of 5 U.S.C. § 8148 which allows a retroactive application should be left to constitutionally "sink or swim" on its own merit or demerits. In essence, this Court should consider the judicial equivalent of an "item veto" of that portion of 5 U.S.C. § 8148 which authorizes a retroactive application.

CONCLUSION

The simple question of whether or not Robert Garner had a contract with the United States has profound, far-reaching significance. If such a contract does exist, then millions of federal employees have a right not to be deprived of these contractual benefits by laws which violate the United States Constitution, in this case, the *ex post facto* clause. Correspondingly, if no such contract exists, then certainly such employees have a right to know it. While the Department of Labor essentially wants to operate with virtually no Constitutional restraint, such approach cannot be squared with an ancient and simple Constitutional provision insisted upon by the Founders of this Country, to-wit: "No . . . *ex post facto* law shall be passed."

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED AUGUST 22, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60212

ROBERT THOMAS GARNER, III,

Plaintiff-Appellant,

versus

U.S. DEPARTMENT OF LABOR,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi.

Before POLITZ, SMITH and DENNIS, Circuit Judges.

POLITZ, Circuit Judge:

Robert T. Garner III appeals the dismissal of his mandamus petition for lack of subject-matter jurisdiction, contending that the district court erred in its holding that 5 U.S.C. § 8148(a) does not implicate the ex post facto clause nor violate the eighth amendment. For the reasons assigned, we affirm.

Appendix A

BACKGROUND

In 1989, following a job-related injury while employed by the federal government, Garner began receiving monthly disability benefits under the Federal Employee Compensation Act.[1] On November 29, 1997, Garner pled guilty to one count of making false statements to obtain federal employee disability compensation in violation of 18 U.S.C. § 1920. The charge was predicated upon Garner's failure to report $854.52 of self-employment income on a benefits entitlement form submitted to the Department of Labor in November 1993.[2] He was sentenced to a fine, three years' probation, and was ordered to pay $854.52 in restitution.

In a letter dated February 13, 1998, the Office of Worker's Compensation Programs, an agency within the Labor Department, informed Garner that, under 5 U.S.C. § 8148(a), his conviction rendered him ineligible to receive any further FECA benefits.[3] Garner requested the OWCP to

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1. 5 U.S.C. § 8101, *et seq.*

2. A FECA recipient is required to verify ongoing entitlement to benefits through submission of this form every fifteen months.

3. Section 8148(a) provides in relevant part:

> Any individual convicted of a violation of section 1920 of title 18, . . . shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter or subchapter III for any injury occurring

(Cont'd)

reconsider its decision contending, as he does in this proceeding, that the statute, enacted on September 20, 1994, operates as an ex post facto law as applied to his November 1993 fraudulent conduct and violates the eighth amendment's proscription against cruel and unusual punishment and excessive fines. The OWCP affirmed its earlier decision and Garner thereafter appealed to the Employees' Compensation Appeals Board. When advised that the appeals process might extend up to two years, Garner filed a mandamus petition reiterating his constitutional claims and seeking reinstatement of his benefits. In response, the Department of Labor invoked 5 U.S.C. § 8128(b)[4] and filed a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction.

(Cont'd)

> on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129.

5 U.S.C. § 8148(a) (1994).

Had Garner been convicted prior to § 8148's enactment he would have forfeited his right to benefits for fifteen months, the period covered by the form in which he failed to report his self-employment income. *See* 5 U.S.C. § 8106(b).

4. Section 8128(b) provides:

> The action of the Secretary or his designee in allowing or denying a payment under this subchapter is —
>
> > (1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(Cont'd)

The district court considered Garner's claims, however, based on an exception to § 8128's jurisdiction-stripping provision, which allows a court to review substantial constitutional claims. On the merits, the court found that the primary purpose of § 8148(a) was to prevent the loss of federal dollars from FECA fraud and to save the taxpayers the cost of continuing to support those who defraud the program. The court concluded that any punitive effect was merely incidental to the statute's remedial goals and, thus, was not subject to scrutiny under the ex post facto clause. Based on its holding that § 8148 was not a punitive statute, the court also concluded that its application constituted neither cruel and unusual punishment nor an excessive fine. Concluding that Garner did not present a viable constitutional claim, the district court granted the Department of Labor's motion to dismiss. Garner timely appealed.

ANALYSIS

A. *Exhaustion of Administrative Remedies:*

Although not addressed by the district court, we note that Garner failed to exhaust his available administrative remedies by filing the instant mandamus petition prior to receiving a ruling from the ECAB. It is well-established that a plaintiff must exhaust administrative remedies before resorting to the courts.[5] "Exhaustion is required in part

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(Cont'd)

> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5. **American Gen. Ins. Co. v. FTC**, 496 F.2d 197 (5th Cir. 1974).

because of the possibility that administrative review might obviate the need for judicial review."[6] There are, however, exceptions to this general rule. A failure to exhaust administrative remedies may be excused when the claimant advances a constitutional challenge unsuitable for determination in an administrative proceeding, or when the unexhausted remedy is plainly inadequate.[7] When an exception is applicable, a federal court has the discretion to excuse the exhaustion requirement.[8] We conclude that both of these exceptions are present herein. Garner's constitutional challenges are not the types of questions committed to the discretion of the Secretary of Labor[9] and, thus, requiring

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6. **Hodges v. Callaway,** 499 F.2d 417, 423 (5th Cir. 1974); **Lewis v. Reagan,** 660 F.2d 124 (5th Cir. 1981).

7. **McCarthy v. Madigan,** 503 U.S. 140 (1992); **Lewis,** 660 F.2d at 127.

8. **Information Resources, Inc. v. United States,** 950 F.2d 1122 (5th Cir. 1992).

9. 5 U.S.C. § 8128(a) provides:

> The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may—
>
> > (1) end, decrease, or increase the compensation previously awarded; or
> >
> > (2) award compensation previously refused or discontinued.

See **McCarthy,** 503 U.S. at 147; **Benton v. United States,** 960 F.2d 19 (5th Cir. 1992).

Garner to exhaust administrative remedies relating to same would be an exercise in futility.[10] Accordingly, the district court properly considered the merits of Garner's claims, and we now do so.

B. *Constitutional Challenges:*

As noted, Garner raises three constitutional challenges to § 8148(a). We review the constitutionality of a federal statute *de novo*.[11]

The Constitution provides that, "[n]o Bill of Attainder or ex post facto law shall be passed."[12] The prohibition against ex post facto laws forbids Congress from enacting any law " 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' "[13] For a law to be ex post facto it must be retrospective; that is, "it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it."[14]

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10. **Hessbrook v. Lennon,** 777 F.2d 999 (5th Cir. 1985).

11. **United States v. Bailey,** 115 F.3d 1222 (5th Cir. 1997).

12. U.S. CONST. art. I, § 9, cl. 3.

13. **Weaver v. Graham,** 450 U.S. 24, 28 (1981) (quoting **Cummings v. Missouri,** 4 Wall. 277, 325-26 (1866)).

14. **Weaver,** 450 U.S. at 29 (citations and footnotes omitted).

Because the ex post facto clause prohibits only retroactive application of legislation that fairly can be characterized as punitive, the threshold inquiry is whether § 8148 imposes "punishment."[15] This is an issue of first impression in this circuit. In rendering its decision, the district court relied on the only published opinion to date that has squarely addressed this question.[16] The district court in **Slugocki v. Department of Labor** focused almost exclusively on the legislative history of § 8148 and concluded that, when taken as a whole, "[c]learly Congress intended this bill to prevent the loss of millions of dollars to FECA fraud and recognized the punitive aspects as secondary to the bill's remedial goal."[17] We agree with that conclusion.

The determination whether a statute inflicts punishment depends on the resolution of three inquiries:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."[18]

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15. **United States v. Rose,** 153 F.3d 208 (5th Cir. 1998); **Bae v. Shalala,** 44 F.3d 489 (7th Cir. 1995).

16. **Slugocki v. Department of Labor,** 988 F. Supp. 1443 (S.D. Fla. 1997).

17. **Id.** at 1448.

18. **Selective Serv. System v. Minnesota Pub. Interest Research Group,** 468 U.S. 841 (1984) (quoting **Nixon v. Administrator of Gen. Svcs.,** 433 U.S. 425, 473 (1977)); **SBC Communications, Inc. v. F.C.C.,** 154 F.3d 226, 242 (5th Cir. 1998).

"[T]he distinction between the punitive and the prophylactically regulatory, which is of course at the root of this case, is admittedly a fine one,"[19] and the determination of each case depends on its own particular context.[20] Further, the presumption of constitutionality that attaches to every legislative enactment "forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it."[21]

As the Supreme Court has made abundantly clear, the denial of a noncontractual governmental benefit does not fall within the historical meaning of legislative punishment.[22] In the case at bar, Garner is disqualified from receiving benefits which the government, in its discretion, provided. We agree with the district court herein, and the court in **Slugocki,** that § 8148(a) reasonably can be said to further the remedial goal of saving the federal government, and therefore the taxpayers, from expending large sums of FECA funds, funds which are limited in amount, on those who have been convicted of defrauding the program. This obviously is protective of the

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19. **SBC Communications, Inc.,** 154 F.3d at 235.

20. **Flemming v. Nestor,** 363 U.S. 603, 616 (1960).

21. **Id.** at 617; **United States v. O'Banion,** 943 F.2d 1422 (5th Cir. 1991).

22. **Selective Serv. System,** 468 U.S. at 853; **Flemming,** 363 U.S. at 617 ("No affirmative disability or restraint is imposed, and certainly nothing approaching the 'infamous punishment' of imprisonment. . . .").

integrity of the program.[23] Although the permanent disqualification from the receipt of FECA benefits undoubtedly is harsh, "[w]here the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected."[24] Finally, a review of the legislative history reflects Congress' intent to fairly allocate scarce resources among numerous federal programs, such as FECA, Head Start, Social Security, and Medicare, all of which are vital to the American public, and to eliminate, to the extent possible, fraud, waste, and abuse in their administration.[25] Section

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23. **Slugocki,** 988 F. Supp. at 1448; **United States v. Stoller,** 78 F.3d 710, 724 (1st Cir. 1996) (statute authorizing industry-wide debarment of former bank's CEO based on his misconduct held to be remedial because its main purpose was to protect the integrity of the nation's financial institutions); **Bae,** 44 F.3d at 493 (finding debarment provision of the Generic Drug Enforcement Act remedial, in part because the statute's aim "was to restore consumer confidence in generic drugs by eradicating the widespread corruption in the generic drug approval process"); **Manocchio v. Kusserow,** 961 F.2d 1539 (11th Cir. 1992) (five year suspension from Medicare program found to be remedial because its purpose was to protect the public from those who defraud the program).

24. **Flemming,** 363 U.S. at 614; **Bae,** 44 F.3d at 495 ("[T]he duration or severity of . . . [a] restriction will not mark it as punishment where it is intended to further a legitimate governmental purpose."); **Stoller,** 78 F.3d at 724.

25. **Selective Serv. System,** 468 U.S. at 855-56 (concluding that statute at issue furthered nonpunitive legislative goals because it sought to promote compliance with the law and fairness in the allocation of federal resources).

8148(a) was enacted as part of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1995.[26] Both the House and Senate floor debates reflect that Congress was concerned primarily with the "tight budget allocations"[27] and the "absolute need for deficit reduction,"[28] and intended "to root out wasteful spending and abusive practices in the Departments of Labor, Health and Human Services, and Education."[29]

Garner points to the statements by Rep. Fawell that § 8148(a) "will enhance the deterrent value of the Federal Employee's Compensation Act, enable the Government to punish those who defraud the program, [and] the most important, save the taxpayers the cost of supporting those who defraud the program," as dispositive evidence of Congress' punitive intent.[30] We reject this contention for two reasons. That a statute serves

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26. Pub. L. 103-333, § 101, 108 Stat. 2539, 2546-47.

27. 140 Cong. Rec. H9446 (daily ed. Sept. 22, 1994) (statement of Rep. Smith).

28. Id. at H9447 (statements of Rep. Porter).

29. 140 Cong. Rec. S. 13406 (daily ed. Sept. 27, 1994) (statement of Sen. Harkin). During his testimony before the Committee on Appropriations, the Inspector General of the Department of Labor noted that "[f]or only five cases involving such fraud, the department of Labor recognized immediate savings of over $120,000 and estimated potential savings of over $4,000,000." S. Rep. No. 103-318, at 6 (1994).

30. 140 Cong. Rec. H9454 (daily ed. Sept. 22, 1994) (statement of Rep. Fawell).

to deter future conduct does not automatically render it punitive, particularly where its overriding goal is remedial.[31] Further, we decline to equate the real or imagined subjective intent of one member of Congress to the objective manifestation of Congress as a whole, and therefore must conclude that these statements are not "the 'smoking gun' evidence of punitive intent" necessary to find that § 8148 was enacted to impose punishment.[32] We hold that § 8148 is not punitive and, as such, does not implicate the ex post facto clause.

Concluding that § 8148 does not impose punishment, we necessarily hold that it does not violate the eighth amendment's proscription against cruel and unusual punishment and excessive fines.[33]

The judgment appealed is AFFIRMED.

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31. **Montana Dept. of Revenue v. Kurth Ranch,** 511 U.S. 767, 780 (1994) ("[N]either a high rate of taxation nor an obvious deterrent purpose automatically marks this tax as a form of punishment."); **Bae,** 44 F.3d at 493 ("A civil sanction that can fairly be said solely to serve remedial goals will not fail under ex post facto scrutiny simply because it is consistent with punitive goals as well."); **Manocchio,** 961 F.2d at 1542; **Jensen v. Heckler,** 766 F.2d 383, 386 (8th Cir. 1985) ("Where, as here, the rational connection to nonpunitive ends remains as a rationale for enacting this provision, a court should not reject all those alternatives save the one which might require invalidation of the statute.") (internal quotations and citations omitted).

32. **SBC Communications, Inc.,** 154 F.3d at 243-44; **Turner v. Glickman,** 207 F.3d 419 (7th Cir. 2000).

33. **Austin v. United States,** 509 U.S. 602 (1993); **Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal Inc.,** 492 U.S. 257, 262 (1989) (noting that the eighth amendment "appl[ies] primarily, and perhaps exclusively, to criminal prosecutions and punishments").

APPENDIX B — MEMORANDUM OPINION AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, WESTERN DIVISION DATED AND FILED MARCH 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

NO. 5:98cv84BrS

ROBERT THOMAS GARNER, III,

PLAINTIFF

VERSUS

U.S. DEPARTMENT OF LABOR

DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the plaintiff's Petition of Mandamus and Petition to Declare Certain Applications of Law Unconstitutional [docket no. 1-1] and on Motion of the defendant to Dismiss [docket no. 2-1] pursuant to Fed. R. Civ. Proc. 12(b)(1). Having carefully considered the motions, briefs, applicable statutory and case law, and being otherwise duly advised in the premises, the Court finds as follows:

Appendix B

I. FACTUAL SUMMARY

On May 19, 1998, the plaintiff filed the present action urging the Court to declare the application of 5 U.S.C. § 8148(a) unconstitutional and to compel payment of all benefits improperly withheld and future benefits under the Federal Employees' Compensation Act ("FECA").

Following a job-related injury while employed by the federal government, Robert Garner began receiving monthly disability benefits pursuant to FECA, 5 U.S.C. § 8101, *et seq.* On November 20, 1997, Garner pleaded guilty to one count of making false statements to obtain federal employee disability compensation benefits, 18 U.S.C. § 1920. The charge was predicated upon Garner's failure to report $854.52 in an application for disability benefits.

In a letter dated February 13, 1998, the Office of Worker's Compensation Programs ("OWCP"), an agency under the Department of Labor, informed Garner that, pursuant to 5 U.S.C. § 8148(a), he was no longer entitled to receive FECA benefits. Termination of the benefits became effective November 20, 1997, the date on which Garner entered his guilty plea. He timely exercised his right to appeal by requesting reconsideration of the decision. Garner argued, as he does in the present action, that forfeiture of the benefits violates the Ex Post Facto Clause and the Eighth Amendment's proscription against cruel and unusual punishment. The OWCP affirmed its earlier decision and Garner appealed to the Employees' Compensation Appeals Board ("ECAB") on May 11, 1998. After learning that the

appeal process may last twenty to twenty-four months, Garner filed the present action asserting constitutional violations.

II. DISCUSSION

The standard governing a motion to dismiss under Rule 12(b)(1) is well established. The court must take the allegations in the complaint to be true unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 954 (5th Cir.1994); *Hobbs v. Hawkins*, 968 F.2d 471, 475 (5th Cir.1992). Subject matter jurisdiction is determined at the time the complaint is filed. *Carney*, 19 F.3d at 954.

This Court is void of jurisdiction to review the decision of the Secretary of Labor to award or deny benefits under FECA.

> (a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may —
>
> > (1) end, decrease, or increase the compensation previously awarded; or
> >
> > (2) award compensation previously refused or discontinued.

> (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is —
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.
>
> Credit shall be allowed in the accounts of a certifying or disbursing official for payments in accordance with that action.

5 U.S.C. § 8128. In *Woodruff v. U.S. Dept. of Labor*, the Eleventh Circuit Court of Appeals described § 8128 as a "door-closing provision," because "[t]he Secretary's decision to award or deny compensation to a particular claimant is not subject to judicial review." 954 F.2d 634, 636-37 (11th Cir.1992); *see also White v. United States*, 143 F.3d 232, 237 (5th Cir.1998). The United States Supreme Court has also commented that Congress uses such "unambiguous and comprehensive language" as found in § 8128(b) "when [it] intends to bar judicial review altogether." *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 780 n. 13 (1985).

The only exception to the "door-closing provision" arises when a FECA plaintiff raises constitutional questions which are unsuitable for determination in an administrative hearing. *Woodruff*, 954 F.2d at 639; *Rodrigues v. Donovan*, 769 F.2d

1344, 1347 (9th Cir.1985). However, "simply alleging a constitutional claim is not adequate to overcome a door-closing statute." *Reid v. Engen*, 765 F.2d 1457, 1461 (9th Cir.1985).

The current question before the Court involves the application of 5 U.S.C. § 8148(a):

> Any individual convicted of a violation of section 1920 of title 18, or any other Federal or State criminal statute relating to fraud in the application for a receipt of any benefit under this subchapter or subchapter III of this chapter, shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter or subchapter III for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129.

A. Ex Post Facto Claim

The ex post facto prohibition found in the United States Constitution, forbids any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (citing *Cummings v. Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867)). The Fifth Circuit explained that

> a statute violates the Ex Post Facto Clause if (1) it criminalizes conduct that was legal when

> done; (2) inflicts greater punishment for an offense than was inflicted by the law in existence at the time the offense was committed; or (3) eliminates a defense that was available under the law at the time the offense was committed.

United States v. Rose, 153 F.3d 208, 210 (5th Cir.1998) (citing *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990)). However, the Ex Post Facto Clause only applies to laws which may be characterized as "punishment." *Flemming v. Nestor*, 363 U.S. 603, 613 (1960); *Manocchio v. Kusserow*, 961 F.2d 1539, 1541 (11th Cir.1992). Therefore, the Court may not consider the ex post facto nature of 5 U.S.C. § 8148(a) unless it first determines that Congress intended the statute to be "punitive" at the time of passage. *Manocchio*, 961 F.2d at 1541.

The plaintiff argues that the fraudulent conduct upon which he pleaded guilty occurred before the amendments to 5 U.S.C. § 8148(a) became effective on September 14, 1994, and that he should only be subject to a fifteen month forfeiture as provided in the pre-amendment statute. Although it is does not control this Court's determination of the present matter, the District Court in *Slugocki v. United States*, 988 F. Supp. 1443 (S.D. Fla. 1997), considered whether 5 U.S.C. § 8148(a) violated the Constitution's Ex Post Facto Clause under circumstances nearly identical to those present. In *Slugocki*, a federal employee filed suit challenging the termination of his FECA benefits after he was convicted of felony fraud in connection with the receipt of FECA benefits. *Inter alia*, the plaintiff argued that application of § 8148(a) was punitive in nature and

contravened the prohibition against ex post facto laws. The District Court rejected Slugocki's claim and found that "the primary goal of this section is to deny benefits to those who attempt to defraud the OWCP and that the punitive sting is a secondary consequence of the forfeiture." *Id.* at 1448.

This Court agrees with the *Slugocki* court and finds that the reasoning employed and the case law cited therein are highly instructive in resolving the present matter. First, Congressman Fawell illustrated the legislative intent of § 8148 stating:

> This will provide the Department of Labor with the authority to eliminate benefits to individuals who have been convicted of defrauding the FECA Program and will save the Federal Government millions of dollars. FECA is a workers' compensation law applicable to more than 3 million civilian employees of the Federal Government. The program pays compensation directly to injured employees, provides for the payment of medical expenses, and pays benefits to dependents of covered workers in cases involving a work-related death. In the past, the criminal and administrative sanctions applicable to persons committing fraud against the FECA Program were very limited. In some cases, the Department of Labor lacked the statutory authority to terminate benefits — even when an individual was convicted of defrauding the program. A temporary legislative fix in the fiscal year 1994 Labor-HHS-Education appropriations

> bill enabled the Department of Labor to pursue a number of cases involving fraudulent claims, which would have cost the taxpayers approximately $4 million over the lifetime of the claims. The language in H.R. 4606 will enhance the deterrent value of the Federal Employee's Compensation Act, enable the Government to punish those who defraud the program, the most important, save the taxpayers the cost of supporting those who defraud the program.

Cong. Rec. H. 9454, Sept. 22, 1994. Congress unambiguously intended the bill to prevent the loss of millions of federal dollars from FECA fraud and recognized its punitive effects as incidental to the remedial goals. Where "the legislative history, taken as a whole, demonstrates that the primary goal of the legislation is to protect present and future . . . beneficiaries [of government aid programs] from the abusers of these programs, . . . the legislative intent . . . is to protect the public" and the sanction is remedial, not punitive. *Manocchio*, 961 F.2d at 1542. Furthermore, "[w]here the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected." *Flemming*, 363 U.S. at 614; *see also*, *Peeler v. Heckler*, 781 F.2d 649, 651 (8th Cir. 1986) (finding that "[i]f the law in question is focused on the past crime, then it is likely intended as punishment, while if the focus is upon the benefit from which the person is barred, it is not, even though the impact on the person may be harsh").

Appendix B

Other courts "have ruled in a variety of contexts that such enactments are constitutional." *Slugocki*, 988 F. Supp. at 1449. The District Court for the Southern District of Florida recently summarized the analogous case law:

> [I]n *Jensen*, 766 F.2d at 386, the Eighth Circuit ruled that a 1980 amendment to the Social Security Act, which barred payment of social security disability benefits to persons in prison on a felony conviction, could constitutionally be applied to a person in prison based upon a 1977 conviction. *See also Wiley v. Bowen*, 824 F.2d 1120 (D.C.Cir.1987). Importantly the Courts in Jensen and Wiley based their decisions on the fact that social security benefits, including the disability benefits at issue in Jensen, were "noncontractual benefits" and, as such, the statute was deemed "neither an ex post facto law nor a bill of attainder because the suspension of a noncontractual benefit cannot be considered a punishment." *Jensen*, 766 F.2d at 386. (Citing *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)). *See also Bae v. Shalala*, 44 F.3d 489, 492 (7th Cir.1995); *Zipkin v. Heckler*, 790 F.2d 16 (2d Cir.1986).
>
> Similarly, in *Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir.1992), the Eleventh Circuit ruled that a mandatory five-year exclusion from participation in Medicare programs based upon a conviction for a Medicare fraud, which exclusion went into effect in 1987, could be applied to a 1984 incident. In so ruling the Court noted,

> While the desire to provide a deterrent is a punitive goal, we find that the legislative history, taken as a whole, demonstrates that the primary goal of the legislation is to protect present and future Medicare beneficiaries from the abusers of these programs. Therefore, since the legislative intent of the exclusionary period is to protect the public, the sanction is remedial, not punitive.

Id. at 1542.

Slugocki, 988 F. Supp. at 1449.

Section 8148(a) addresses the disability benefits conferred under FECA and provides for their discontinuance when the beneficiary is convicted for making fraudulent FECA applications. It does not exact an arbitrary or capricious fine which only serves the goals of deterrence and retribution. Instead, it provides the practical and equitable conclusion that a person may not benefit from a program upon which he commits fraud. The Court finds that § 8148(a) is not punitive and, therefore, is not subject to scrutiny under the Ex Post Facto Clause.

B. Cruel and Unusual Punishment/ Excessive Fine Claims

The plaintiff has wholly failed to show that application of § 8148(a) constitutes cruel and unusual punishment. As

discussed above, the forfeiture of future disability benefits under FECA is not primarily punitive in nature. Moreover, any punitive effects are merely incidental and clearly not "so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice." *United States v. Vice*, 562 F.2d 1004, 1005 (5th Cir. 1977).

However, "[t]he Eighth Amendment [also] protects against excessive fines, including forfeitures." *Hudson v. United States*, 118 S.Ct. 488, 495 (1997). In *United States v. Bajakajian*, the United States Supreme Court first stuck down a fine as "excessive" under the Eighth Amendment. 118 S.Ct. 2028, 2033 (1998). There, the defendant was charged with attempting to leave the United States with $357,144, which he had failed to report as required by 31 U.S.C. § 5316(a)(1)(A). After Bajakajian pleaded guilty to the charges, the government sought forfeiture of the entire amount under 18 U.S.C. § 982(a)(1), which provides that a person convicted of willfully violating § 5316 shall forfeit "any property . . . involved in such an offense." Upon granting the defendant's writ of certiorari, the United States Supreme Court considered whether the forfeiture violated the Eighth Amendments' prohibition against excessive fines.

The Court first noted that the sanction imposed by § 982 constitutes a punishment and rejected the government's arguments that the statute was remedial as it compensated the government for the loss of information. *Id.* at 2034. Next, the Court directed its inquiry to whether the "punitive forfeiture [was] grossly disproportional to the gravity of a defendant's offense." *Id.* at 2036. In reaching its conclusion that the punishment was "grossly disproportional" to the

offense, the Court made several observations: (1) the respondent's violation was unrelated to any other illegal activities; (2) the harm caused by the respondent (loss of information) only affected one party, the government; and (3) the respondent committed no fraud and caused "no loss to the public fisc." *Id.* at 2038-39.

The case *sub judice* is readily distinguishable from *Bajakajian*. First, the primary purpose of § 8148(a) is not to punish but to limit the future payment of federal funds to persons guilty of receiving them under false, fraudulent FECA applications. Furthermore, a plaintiff subject to forfeiture under § 8148(a) does not simply contribute to the loss of information collected by the government. He causes loss to the public fisc by fraudulently applying for and receiving disability benefits which are derived from federal tax dollars.

The Court finds that § 8148(a) does not constitute an "excessive fine" as defined by Eighth Amendment jurisprudence. Without a sufficient showing that § 8148(a) violates a right secured under the United States Constitution, the plaintiff fails to overcome its "door closing provision." Therefore, this Court lacks subject matter jurisdiction over the plaintiff's remaining motion to enjoin the defendant from applying the forfeiture provision and to order that it compensate the plaintiff for past forfeitures. Accordingly,

IT IS THEREFORE ORDERED that the plaintiff's Petition of Mandamus and Petition to Declare Certain Applications of Law Unconstitutional [docket no. 1-1] are DENIED. FURTHERMORE, IT IS ORDERED that

defendant's Motion to Dismiss [docket no. 2-1] is GRANTED.

A separate judgment will be entered herein in accordance with this order as required by Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this the 29th day of March 1999.

s/ David Bramlette
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. 5:98cv84BrS

ROBERT THOMAS GARNER, III,

PLAINTIFF

VERSUS

U.S. DEPARTMENT OF LABOR,

DEFENDANT

JUDGMENT

This matter is before the Court upon the plaintiff's Petition of Mandamus and Petition to Declare Certain Applications of Law Unconstitutional and on Motion of the defendant to Dismiss. In accordance with the Memorandum Opinion entered in this cause, this date, incorporated herein by reference, it is hereby,

ORDERED AND ADJUDGED that the Motion to Dismiss pursuant to Fed. R. Civ. Proc. 12(b)(1) is GRANTED.

SO ORDERED AND ADJUDGED, this the 29th day of March 1999.

s/ David Bramlette
UNITED STATES DISTRICT
JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 24, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60212

ROBERT THOMAS GARNER, III

Plaintiff – Appellant

v.

US DEPARTMENT OF LABOR

Defendant – Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING

Before POLITZ, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Henry A. Politz
HENRY A. POLITZ
United States Circuit Judge

APPENDIX D — NOTICE OF DECISION OF U.S. DEPARTMENT OF LABOR AS ISSUED MARCH 31, 1998

File Number: 06-0472167
Employee: Robert Garner

NOTICE OF DECISION

Issue: The issue for determination is whether the additional evidence submitted in support of this application for reconsideration is sufficient to warrant modification of the Office's prior decision of February 13, 1998.

Requirements for Entitlement: Section 8148(a) states:

> Any individual convicted of a violation of section 1920 of title 18, or any other Federal or State criminal statute relating to fraud in the application for a receipt of any benefit under this subchapter or subchapter III of this chapter, shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter or subchapter III for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129.

Background: By letter decision dated February 13, 1998, your benefits under the Federal Employees' Compensation Act (FECA) were terminated effective November 20, 1997 on the grounds that you plead guilty to making false statements in order to receive benefits under the FECA.

Appendix D

By letter dated February 26, 1998, your attorney requested reconsideration. In support of the request, your attorney submitted a document titled "Notice of Request for Reconsideration", a copy of our final 2/13/98 decision, a copy of your criminal judgment and sentencing order effective November 20, 1997 and a copy of a memorandum of understanding dated 9/16/97 between you and your attorney and the U.S. attorney. Your attorney also submitted copies of section 8148 under the Act and section 1920 under 18 U.S.C. In the notice, your attorney raised two legal arguments which were not previously considered at the time of the original denial.

Discussion of Evidence: Your attorney argues that since you were convicted of a misdemeanor on 11/20/97 as opposed to a felony, section 8148 of the Act does not apply. His contention is without merit for the reason that the provision of section 8148 (a) applies to individuals who are convicted of fraudulently claiming or obtaining benefits under the FECA on or after 9/30/94. Such individuals will lose their entitlement to medical benefits, compensation for wage loss, and any other benefits payable under the FECA. No distinction is made between an individual being convicted of a criminal misdemeanor or felony related to fraudulently claiming or obtaining benefits under the FECA.

The evidence of record shows that you were convicted of a federal crime of falsifying your employment history on our federal form CA-1032. On 11/20/97 a federal district judge fined you $25.00 and sentenced you to three years probation based upon your plea of guilty to count one of the indictment

charging you with knowingly making a fraudulent statement in violation 18 U.S.C. section 1920. Based upon your conviction, you are subject to provision (a) under section 8148. Your attorney contends that if section 8148 does apply, it violates the "cruel and unusual punishment" provision of the U.S. Constitution. Since this contention is not relevant with respect to the issue at hand, it won't be considered.

Your attorney also argues that the date of your misdemeanor occurred on 11/11/93 which was prior to September 30, 1994, the date he claims that a new forfeiture section was added to 8148 providing for the termination of all benefits. By way of background information, Public Law 103-333 went into effect on 9/30/94 and amended section 8148 of the Act by adding a provision for the termination of benefits payable to individuals who have been *convicted* of defrauding the FECA program. Therefore, since the date of the conviction is the determining factor rather than the date of when the misdemeanor occurred, section 8148 applies to your situation. Of note, 8148 was amended to include not just the termination of all benefits to those individuals described above, but to also provide for the suspension and/or adjustment of benefits for those claimants convicted of felonies unrelated to claims under the FECA and imprisoned as a result.

Basis for Decision: Neither of the arguments submitted in support of this reconsideration application are sufficient to establish that the Office's prior decision of terminating all benefits effective 11/20/97 was issued in error.

Appendix D

Conclusion: This application for reconsideration is, therefore, disallowed on the basis that the new legal arguments presented by your attorney in support of your application are not sufficient to warrant modification of the Office's 2/13/98 decision in this case.

s/ LH Choubane
Leslie H. Choubane
Sr. Claims Examiner
03/31/98